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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GEORGE OMAR GARCIA, Defendant and Appellant.	H038240 (Monterey County Super. Ct. No. SS100524

I. INTRODUCTION

Defendant George Omar Garcia waived his right to a jury trial and agreed that two witnesses could be excused in exchange for a sentencing range of 13 years 4 months as the bottom and 18 years 4 months as the top and no additional charges. After a court trial, defendant was found guilty of residential burglary (Pen. Code, § 459)[1] and possession of a firearm by a felon (former § 12021, subd. (a)(1)). The trial court also found true the allegations that defendant had one prior strike conviction (§ 1170.12, subd. (c)(1)) and had served two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to an aggregate term of 14 years 4 months.

On appeal, defendant contends that the trial court committed structural error when the court denied his motion to withdraw his jury trial waiver. Defendant also contends

[1] All further statutory references are to the Penal Code unless otherwise indicated.

that the imposition of a consecutive one-year, four-month sentence on the conviction of possession of a firearm by a felon violates the section 654 prohibition on multiple punishment. For the reasons stated below, we find no merit in defendant's contentions and therefore we will affirm the judgment.

Defendant has also filed a petition for writ of habeas corpus, which this court ordered to be considered with the appeal. In his habeas corpus petition, defendant raises an issue concerning the presentence custody credit awarded by the trial court. Having determined that defendant has made a prima facie showing that he is entitled to the relief requested in the petition, by separate order filed this day we issue an order to show cause returnable in the superior court.

II. FACTUAL BACKGROUND

Our summary of the factual background is primarily taken from the reporter's transcript of the two-day court trial held in December 2011 and January 2012.

Defendant was released from custody on January 9, 2010, and reported to parole officer Anita Coley on January 11, 2010. He informed Coley that he was living in his mother's apartment in Salinas.

On January 12, 2010, police sergeant George Duffey left his apartment in Salinas at about 6:30 a.m. When Duffey returned home at about 7:30 p.m., he discovered that his apartment had been ransacked and burglarized. After searching the apartment, Duffey determined that the items missing after the burglary included four firearms, two bullet-resistant vests, approximately six to eight duty badges, and a duffle bag. Duffey called the police department and the apartment manager to report the burglary.

The apartment manager met with Duffey on the night of the burglary and gave him a piece of paper that had been found in the apartment complex. An apartment maintenance worker, Tara Hill, had found the piece of paper on the ground near Duffey's apartment while she was removing trash. Hill took the piece of paper to the apartment complex office because it looked like it might be an important paper. After receiving the

paper from the apartment manager, Duffey gave it to the police officer who responded on the night of the burglary.

Ben Draeger, a police officer with the City of Salinas, investigated the piece of paper that Hill had found. The paper was an Alameda County Sheriff's Office inmate disciplinary notification report (which the parties later stipulated was handed to defendant on December 1, 2009). After obtaining the date of birth for the "Jorge Garcia" listed on the inmate disciplinary notification report, Officer Draeger checked the Salinas Police Department's database. Officer Draeger discovered that defendant had the same date of birth as "Jorge Garcia" and that defendant's address of record was in Salinas. Since the Salinas Police Department's records also indicated that defendant was on parole, Officer Draeger contacted Coley, defendant's parole officer. It was then determined that a parole search was appropriate to determine if there was any stolen property at defendant's residence.

On January 13, 2010, Coley and Officer Draeger, along with other officers, conducted a parole search of the apartment in Salinas where defendant was living with his mother. In the mother's bedroom, Officer Draeger saw a small piece of luggage that was open and contained one revolver and one semi-automatic handgun, as well as a bullet-proof vest, holsters, and bullets. Defendant's mother did not know how the guns got in her bedroom and had not seen them before the parole search. Duffey later identified the items recovered in the search as items that were taken from his apartment in the burglary.

Since defendant's whereabouts were unknown, Officer Draeger disseminated a statewide "be-on-the-lookout" notice on January 14, 2010. The next day, Officer Draeger learned that defendant had been taken into custody in Calexico and obtained a

police report from the Calexico Police Department.[2] The report stated that on January 14, 2010, a Calexico police officer determined that the license plate number for a vehicle parked at a 7-Eleven store in Calexico belonged to the vehicle described in the "be-on-the-lookout" notice. Police officers detained defendant inside the 7-Eleven store and took him into custody. When defendant was asked his name, defendant stated to the arresting officer, " 'It's me, you got me. I'm who you are looking for.' "

According to defendant's mother's trial testimony, defendant slept in her apartment every night after his release from custody and he and his girlfriend stayed there during the day of the burglary, January 12, 2010. However, when the mother was questioned by Officer Draeger the day after the burglary (through Spanish language interpretation by Yolanda Rocha, a police officer with the City of Salinas), the mother stated that defendant came and went as he pleased.

Defendant's girlfriend recalled that she and defendant arrived at his mother's apartment early in the morning on January 12, 2010, and stayed there until 1:00 p.m., when defendant drove her home. Defendant testified that after dropping his girlfriend off, he returned to his mother's apartment and stayed there until 8:00 p.m. or 9:00 p.m., when his brother picked him up in their sister's truck and they went to a store together. After about 45 minutes, defendant returned to his mother's apartment and spent the night there.

Defendant also testified that he left his folder of jail paperwork in his sister's truck. He did not know how the guns found in the parole search got into his mother's bedroom. He also did not know how a duffle bag found in his car in Calexico, which apparently belonged to the victim, could have been placed in his car. He was in Calexico

[2] The parties stipulated that the Calexico Police Department's report could be admitted into evidence. The report did not include any information about the search of defendant's vehicle or any items recovered in the search.

to visit his sick grandfather and had stopped at the 7-Eleven store to get help finding his grandmother's house.

III. PROCEDURAL BACKGROUND

The information filed on June 7, 2010, charged defendant with residential burglary (§ 459; count 1) and possession of a firearm by a felon (former § 12021, subd. (a)(1); count 2). The information also included the special allegations that defendant had committed the offense while released on bail (former § 12022.1), had one prior strike conviction (§ 1170.12, subd. (c)(1)), and had served two prior prison terms (§ 667.5, subd. (b)).

A jury trial was originally set for July 26, 2010. After defendant waived time on July 1, 2010, and the parties requested a continuance, the trial date was vacated. On August 24, 2010, a jury trial was set for November 1, 2010.

Shortly before trial, on October 28, 2010, defendant waived his right to a jury trial and entered into an agreement with the People, as follows.

"[DEFENSE COUNSEL]: Your Honor, I believe that [defendant] is prepared to waive jury . . . and there will be some specifics . . . ."

"[THE PROSECUTOR]: Thank you, Your Honor. [¶] In Case Number SS100524, residential burglary, the People would ask for a stipulation from the defense in two areas. [¶] Number 1, that Officer Derek Hackett from Calexico Police [Department] would be excused from coming here and testifying. In lieu of that, his police report would come into evidence. [¶] Number 2, Deputy J. Deleon from the Alameda Sheriff's Office would be excused from coming here, and instead of her, it would be stipulated that . . . if she came here she would testify that she is an Alameda Deputy Sheriff, and she handed to [defendant] an inmate disciplinary notification report on 12-1-09, and that was admitted into evidence in the preliminary hearing. It would be that same document that was admitted into evidence. So those would be the two stipulations.

"THE COURT: [Defendant], do you agree to that? [¶] You have the right to confront and cross-examine the witnesses against you if it be presented against you. [¶] Do you wish to waive that right for purposes of . . . the offer that the district attorney just made in this case, just in those two limited areas? Do you wish to give up that right?

"THE DEFENDANT: Yes.

"THE COURT: [Defense counsel], you join in the waiver of the right to confront and cross-examine witnesses as it relates to those two witnesses?

"[DEFENSE COUNSEL]: Yes, assuming all conditions are met, yes.

"THE COURT: Meaning the additional conditions of the jury waiver?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: Thank you.

"[THE PROSECUTOR]: Just to add to the Calexico Police [report] -- I don't have the report, but counsel and I both have the report.

"[DEFENSE COUNSEL]: We know the report and the witness. We will agree that the police report would be presented if we did a court trial.

"THE COURT: [Defendant] discussed that with you, and you are agreeing to that, as well. [¶] So instead of having a live officer here where there could be cross-examination of that officer, the Court would be receiving it into evidence that report instead. Do you agree to that?

"THE DEFENDANT: Yes.

"THE COURT: Do you join in that?

"[DEFENSE COUNSEL]: I do.

"[THE PROSECUTOR]: I think we have some parameters on the jury waiver, the actual exposure to the defendant.

"THE COURT: Okay.

"[THE PROSECUTOR]: [W]e would ask for a jury waiver . . . and . . . that [the] sentencing range . . . would be 13 years, 4 months as a bottom, and 18 years, 4 months as a top.

"[DEFENSE COUNSEL]: That is agreed. . . . [T]hat is the range that would be available to the Court if we did the court trial. . . .

"THE COURT: Okay. [¶] [Defendant], you have the right to a jury trial . . . where 12 persons from the community would decide whether you are guilty or not guilty of the offense. [¶] The Court's understanding is that you wish to waive that right in both cases and have a judge-only trial where a judge would decide whether you are guilty of the offenses charged in this case; is that correct?

"THE DEFENDANT: Yeah. I guess, yes.

"THE COURT: Is that yes? I want to make sure.

"THE DEFENDANT: Yes.

"THE COURT: So the understanding, though, is the jury waiver would be on the conditions that [counsel] have announced on the record in terms of a top, and then the offer that has been extended to you would remain open, as well. [¶] Is that your understanding?

"THE DEFENDANT: Yes.

"THE COURT: In case ending -524, you do wish to waive your right to a jury trial in that case; is that correct?

"THE DEFENDANT: Yeah.

"THE COURT: That would be as to not only the charges, but also any special enhancements? [¶] . . . [¶]

"[THE PROSECUTOR]: There is one additional we talked about. It would be at prelim I would prove that this person stole four handguns if I were to go to trial. [¶] . . . [¶] So we would add one count of [section] 487[, subdivision] (d).

"[DEFENSE COUNSEL]: The People have agreed that although they may be able to prove four or five separate counts of that charge, that the agreement would be that if we did a court trial, they would add only one so that his exposure would be [the] possibility of two strikes, residential burglary and theft of the firearm.

"THE COURT: The understanding would be if that happened, there would be a jury waiver as to that count, as well?

"[DEFENSE COUNSEL]: Right.

"THE COURT: [Defendant], that is your understanding with regard to . . . case ending -524, that is the case involving the residential burglary. There is also alleged a felon in possession of a firearm and multiple enhancements. [¶] You have the right to a jury trial as to each charge, also as to the enhancements. [¶] Do you wish to give up that right?

"THE DEFENDANT: Yes.

"THE COURT: You join in that, [defense counsel]?

"[DEFENSE COUNSEL]: I do.

"THE COURT: People join in the jury waiver?

"[THE PROSECUTOR]: Yes."

After defendant waived his right to a jury trial, the jury trial set for November 1, 2010, was vacated and the matter was continued to December 7, 2010, for court trial setting. Defendant filed a *Marsden* motion[3] that was denied on December 14, 2010. The date for the court trial setting was continued to December 16, 2010. The parties requested a continuance and the court trial setting was continued twice more, to December 21, 2010, and then December 28, 2010.

On December 28, 2010, defendant filed a motion to withdraw his jury trial waiver. In his motion, defendant argued that he had good cause to withdraw his jury trial waiver

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

because he had not understood that he was waiving his right to a jury trial. In his supporting declaration, defendant stated: "I did not understand that I was waiving my right to a jury trial; I thought that I was waiving my right to a speedy trial. My attorney advised me that I should enter the waiver to allow for additional time to prepare a defense and to negotiate with the prosecution. If I had understood that I was waiving my right to a jury on these cases, I would not have told the court that I agree to the waivers."

The following colloquy took place during the December 28, 2010 hearing on defendant's motion to withdraw his jury trial waiver:

"THE COURT: And this is a motion to withdraw the jury waiver, and also a declaration in support of the motion, is that correct?

"[DEFENSE COUNSEL]: Correct.

"THE COURT: The motion has been filed. Any further response, Mr. [prosecutor]?

"[THE PROSECUTOR]: Yes, Your Honor.

"THE COURT: Go ahead.

"[THE PROSECUTOR]: I don't believe good cause has been shown. [¶] . . . [¶] [I] think that the declaration by [defendant] is not believable for the following reasons: Number one, he claims that he thought he was waiving time on October 28th, when in fact he waived his right to a jury trial. . . . [¶] Your Honor asked him no fewer than seven times if he was waiving his right to a jury trial. . . . Your Honor was quite clear in asking him. . . . [¶] . . . We even talked about . . . some of the evidence that was going to come in, the two witnesses from out of county, and he said he understood this. So I think his declaration is totally unbelievable.

"THE COURT: Thank you. Mr. [defense counsel].

"[DEFENSE COUNSEL]: [Defendant] is aware of what the record reflects from the transcript of the date the jury waiver was taken. But he is insisting to the Court he

was confused, and did not understand. He's asking the Court to allow him to withdraw . . . because he now wishes to have a jury trial.

"THE COURT: And the Court in this case, besides what's reflected in the transcript, the Court has a specific recollection of taking the jury waiver . . . . [T]he Court, once again, tries to take the time to explain in terms of what a jury trial is; and the Court did explain to [defendant] . . . what a jury trial would be, that 12 persons from the community would decide whether he was guilty or not guilty. [¶] The Court specifically remembers [defendant's] demeanor as well, . . . there was . . . no appearance of confusion on [defendant] at all. And the Court does feel that [defendant] . . . knowingly and voluntarily, and intelligently waived his right to a jury trial . . . and elected to have a judge only trial. The Court . . . has evaluated this very carefully, because the Court is mindful that the right to a jury trial . . . it's an absolute right that [defendant] has; . . . [citations]. And the Court feels that . . . he knowingly, and voluntarily, and intelligently waived his right to a jury trial. [T]he District Attorney was prepared to go forward to a jury trial earlier, and the Court believes that . . . [defendant] did waive that right. [¶] And the Court does make a specific finding, . . . just based on the observations the Court had of [defendant] in court, when he was knowingly and voluntarily, and intelligently waiving his right to a jury trial . . . the Court just does not find that declaration is credible, and makes a factual finding of that. [¶] And so the Court would respectfully deny the request . . . to withdraw the jury waiver."

After defendant's motion to withdraw his jury trial waiver was denied on December 28, 2010, defense counsel requested a continuance and the court set January 20, 2011, as the date for court trial setting. On that day, the court set May 6, 2011, as the date for the court trial. The People then filed a motion to continue the court trial due to a calendar conflict. Defendant did not oppose the motion. The court vacated the May 6, 2011 court trial date and set a new date of June 3, 2011. Thereafter, defendant filed a second *Marsden* motion, which the court denied in April 2011.

Defense counsel filed an affidavit of conflict on June 2, 2011, and on June 3, 2011, the alternate defender accepted the appointment. Defendant then requested a continuance to which the People had no objection. The court granted the request and the matter proceeded to a pretrial conference on September 20, 2011. The court trial was set for October 21, 2011.

On October 13, 2011, the People filed a motion for a videotaped conditional examination of witness Hill on the ground that she was a material witness who was intending to relocate out of state. The examination was held on October 18, 2011. The court then vacated the October 21, 2011 court trial date and set a new court trial date of December 16, 2011.

The court trial was held on December 16, 2011, and January 20, 2012. At the conclusion of the second day of trial, the court found beyond a reasonable doubt that defendant was guilty of residential burglary (§ 459; count 1) and of possession of a firearm by a felon (former § 12021, subd. (a)(1); count 2) and found true the special allegations that that defendant had one prior strike conviction (§ 1170.12, subd. (c)(1)) and had served two prior prison terms (§ 667.5, subd. (b)). The court found that defendant was not guilty of committing the offense while released on bail (§ 12022.1).

Defendant filed a motion for new trial, which the trial court denied at the time of the sentencing hearing held on April 10, 2012. The court also denied defendant's requests that the sentence imposed on the conviction of possession of a firearm by a felon be stayed pursuant to section 654 and that he receive presentence custody credits from the date of his arrest. The court then sentenced defendant to an aggregate term of 14 years 4 months, comprised of 12 years (the upper term, doubled) on count 1, a consecutive of term of one year four months (one-third the middle term, doubled) on count 2, and a consecutive one-year enhancement pursuant to section 667.5, subdivision (b).

Thereafter, defendant filed a timely notice of appeal.

IV. DISCUSSION

Defendant contends that the trial court committed structural error requiring reversal of the judgment when the court denied his motion to withdraw his jury trial waiver nearly one year in advance of the court trial. Defendant also contends that imposition of a consecutive one-year four-month sentence on the conviction of possession of a firearm by a felon violates the section 654 prohibition on multiple punishment.

A. Withdrawal of Jury Trial Waiver

The California Supreme Court has instructed that "[a] defendant in a criminal prosecution has a right to a trial by jury under both the federal Constitution (*Duncan v. Louisiana* (1968) 391 U.S. [] 145 [citation]) and our state Constitution (Cal. Const., art. I, § 16). (See also Pen. Code, §§ 689, 1042.)" (*People v. Ernst* (1994) 8 Cal.4th 441, 444-445 (*Ernst*).) The state Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, ..." (Cal. Const., art. I, § 16.) Thus, "the denial of a defendant's constitutional right to jury trial on a charged offense constitutes structural error that requires reversal without consideration of the strength of the evidence. [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 52, fn. 8.)

However, "[t]he California Constitution permits the defendant and the prosecution to waive their right to a jury and elect a court trial, but specifies the following manner for doing so: 'A jury may be waived in a criminal cause by the consent of both parties *expressed in open court by the defendant and the defendant's counsel*.' (Cal. Const., art. I, § 16, italics added.)" (*Ernst, supra*, 8 Cal.4th at p. 445; see also *People v. Collins* (2001) 26 Cal.4th 297, 305 [common practice of accepting a jury waiver is clearly constitutional].)

"To be valid, a defendant's waiver of the right to a jury must also be 'knowing and intelligent, that is, " ' "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it," ' " as well as voluntary

" ' "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." ' " [Citations.]' [Citation.]" (*People v. Weaver* (2012) 53 Cal.4th 1056, 1072.)

The California Supreme Court has also instructed that "[it] is well established that a waiver of a jury trial, voluntarily and regularly made, cannot afterward be withdrawn except in the discretion of the court. [Citations.] Absent special circumstances the court may deny a motion to withdraw such a waiver especially where adverse consequences will flow from the defendant's change of mind. In exercising its discretion the court may consider such matters as the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion." (*People v. Chambers* (1972) 7 Cal.3d 666, 670-671 (*Chambers*).

In *Chambers*, the defendant appeared on the day of trial and moved to withdraw his jury waiver "stating only that defendant's brother opposed a court trial. The court denied the motion and proceeded to trial." (*Chambers*, *supra*, 7 Cal.3d at p. 670.) The denial was upheld by our Supreme Court, which determined that "the motion to withdraw the waiver was not timely. Neither are there special circumstances which would compel the court to grant the motion notwithstanding the delay of trial, inconvenience to the witnesses and potential prejudice to the People. Little or no weight should be given to the unexplained wish of defendant's brother for a jury trial. The denial of the motion to withdraw the jury trial waiver under these circumstances was clearly not an abuse of discretion." (*Id.* at p. 671) Similarly, in *People v. Colton* (1949) 92 Cal.App.2d 704, 706-707, the appellate court ruled that the trial court did not abuse its discretion in denying the defendant's motion to withdraw his jury trial waiver on the day the case was called for the court trial. However, as stated in *People v. Abrams* (1963) 211 Cal.App.2d 773, 776 with regard to a jury trial waiver, "[e]very case, of course, stands on its own facts and no two are exactly alike . . . ."

Having reviewed the rules governing the defendant's withdrawal of a jury trial waiver, we turn to defendant's contention that the trial court abused its discretion in the present case.

B. Analysis

1. Abuse of Discretion

Defendant asserts that he timely moved to withdraw his jury trial waiver nearly one year before the date set for the court trial and therefore no "interference with the orderly administration of court business, unnecessary delay, inconvenience to witnesses, or prejudice to the prosecution [would] have resulted" if his motion had been granted. Defendant argues that the erroneous denial of his constitutional right to a jury trial constitutes structural error requiring reversal, relying in part on the decisions in *People v. Melton* (1954) 125 Cal.App.2d Supp. 901 (*Melton*) and *People v. Osmon* (1961) 195 Cal.App.2d 151, 154-155 (*Osmon*).)

In *Melton,* the appellate court determined that the trial court had abused its discretion in denying the defendant's motion to withdraw his jury trial waiver because "[n]othing in the record before the trial judge or on this appeal indicates that the granting of a jury trial would have delayed the trial of the case or in any way have prejudiced the legitimate interests of the prosecution." (*Melton*, *supra,* 125 Cal.App.2d Supp. at p. 906.)

In *Osmon,* the appellate court found that the defendant's request to withdraw his jury trial waiver was made sufficiently in advance of the court trial date so as not to have an adverse effect on the administration of justice, and therefore the trial court abused its discretion in denying the request. (*Osmon*, *supra,* 195 Cal.App.2d at pp. 154-155.)

The People respond that the trial court did not abuse its discretion because defendant's jury trial waiver was valid and he failed to "articulate any special circumstance to warrant granting his request." The People also argue that they detrimentally "relied on the jury waiver for trial strategy, as the parties stipulated that two witnesses who lived out of the area would be excused from testifying at a court trial and

their reports would be admitted in lieu of live testimony. Further, the prosecution had been prepared to begin a jury trial earlier, but for the waiver, and [defendant] moved to withdraw the jury waiver on the day the parties met to set a trial date."

Additionally, the People contend that the decision in *Chambers, supra,* 7 Cal.3d at p. 670, should be read to require a showing of good cause for withdrawal of a jury trial waiver, since the court "specifically cited 'the reason for the requested withdrawal' as a matter to be considered by the trial court." The People further rely on the decision in *People v. Sanders* (1987) 191 Cal.App.3d 79 for the proposition that there is no meaningful difference between a jury trial waiver and a guilty plea, and therefore defendant must make a showing of good cause for his request to withdraw his jury trial waiver.

The People also argue that the present case is distinguishable from *Osmon, supra,* 195 Cal.App.2d 151, since, unlike the defendant in *Osmon,* defendant never renewed his motion to withdraw his jury trial waiver. The decision in *Melton, supra,* 125 Cal.App.2d Supp. 901 is also distinguishable, according to the People, because unlike the defendant in *Melton,* defendant was represented by counsel at the time of his jury trial waiver.

As we have noted, the *Chambers* court instructed that "[i]t is well established that a waiver of a jury trial, voluntarily and regularly made, cannot afterward be withdrawn except in the discretion of the court. [Citations.] Absent special circumstances the court may deny a motion to withdraw such a waiver especially where adverse consequences will flow from the defendant's change of mind. In exercising its discretion the court may consider such matters as the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion." (*Chambers, supra,* 7 Cal.3d at pp. 670-671.)

Thus, our review is governed by the deferential abuse of discretion standard that applies to an order denying a defendant's motion to withdraw a jury trial. (*Chambers,*

supra, 7 Cal.3d at pp. 670-671.) " 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286 (*Lewis*).)

In the present case, our review of the record shows that the trial court did not abuse its discretion. During the hearing on the motion held on December 28, 2010, trial counsel argued, on the basis of defendant's supporting declaration, that when defendant agreed to a jury trial waiver on October 28, 2010, "he was confused, and did not understand. He's asking the Court to allow him to withdraw [his jury trial waiver] because he now wishes to have a jury trial." In his declaration, defendant stated: "I did not understand that I was waiving my right to a jury trial; I thought that I was waiving my right to a speedy trial." The trial court, which had accepted defendant's jury trial waiver, found that defendant had knowingly waived his jury trial right and his claim of confusion and misunderstanding lacked credibility. The court also found that the prosecutor had been prepared to go forward with the jury trial that was set to begin four days after defendant waived his right to a jury trial on October 28, 2010.

On this record, we determine under *Chambers* that the trial court properly considered that defendant's "the reason for the requested withdrawal" lacked credibility in ruling upon defendant's motion to withdraw his jury trial waiver. (*Chambers*, *supra*, 7 Cal.3d at p. 671.) Defendant did not argue any of the other *Chambers* factors, or other basis for his motion to withdraw his jury trial waiver, and therefore the trial court did not expressly consider those factors.

We presume, however, that in exercising its discretion the trial court considered the other *Chambers* factors, including whether "adverse consequences [would] flow from the defendant's change of mind," the timeliness of the motion, and the undue delay and inconvenience to witnesses that could result if defendant's motion to withdraw his jury

trial waiver was granted. (*Chambers, supra,* 7 Cal.3d at p. 670.) "On appeal, we presume that a judgment or order of the trial court is correct, ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 666.)

The record shows that granting defendant's motion to withdraw his jury trial waiver at the time it was made, on December 28, 2010, would have resulted in undue delay and other adverse consequences. The People had been prepared to go to jury trial on November 1, 2010, only a few days after defendant waived his jury trial right on October 28, 2010. Due to defendant's jury trial waiver, the matter was continued for court trial setting to December 7, 2010, and then continued to December 16, 2010, and December 28, 2010, for court trial setting. Further delay to allow the parties to prepare again for a jury trial would have been unavoidable. Additionally, obtaining the witnesses from Calexico and Alameda County who had been excused, pursuant to the parties' stipulations regarding the court trial, would have caused unavoidable delay. And, as the People point out, during the year that court trial setting was continued for various reasons as requested by the parties, and the prosecution prepared for a court trial pursuant to the parties' stipulations, defendant never renewed his motion to withdraw his jury trial waiver.

Accordingly, we conclude that on this record defendant has not made an affirmative showing that the trial court " ' "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*Lewis, supra,* 46 Cal.4th at p. 1286.) We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion to withdraw his jury trial waiver.

2. Ineffective Assistance of Counsel

We further conclude, for reasons that we will discuss, that defendant's claim that counsel was ineffective in failing to secure his right to a jury trial lacks merit.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

According to defendant, his trial counsel failed to secure his right to a jury trial due to counsel's "deficient performance." Defendant explains that "[d]efense counsel's deficient performance by mistaken reliance on section 1018 [the statute governing guilty plea withdrawals] and superimposition of its guilty plea withdrawal good cause requirement, without citation to the correct legal principles caused structural error." He further argues that no showing of prejudice is required where, as here, the ineffective assistance of counsel caused structural error.

The People reject defendant's ineffective assistance of counsel claim. They argue that since defendant lacked good cause for his motion to withdraw his jury trial waiver, similar to the good cause standard for a guilty plea withdrawal under section 1018, there is no reasonable probability that the trial court would have granted defendant's motion absent trial counsel's citation to section 1018.

We are not persuaded that trial counsel was ineffective due to counsel's citation to section 1018 in the points and authorities submitted with the motion to withdraw jury trial waiver. (See *Anderson*, *supra*, 25 Cal.4th at p. 569.) Contrary to defendant's contention, trial counsel did not rely entirely on section 1018 in arguing defendant's motion to withdraw his jury trial waiver. Instead, as we have noted, the record reflects that defendant submitted a declaration explaining that he thought he was waiving his right to a speedy trial, not a jury trial, when he agreed to waive his jury trial right. Trial counsel then argued at the hearing, on the basis of defendant's declaration, that the reason for defendant's request to withdraw his jury trial waiver was that he had been confused and did not understand that he was waiving his jury trial right. The trial court found that defendant's reason for requesting withdrawal of his jury trial waiver lacked credibility, and that the People had been prepared to proceed to jury trial at the time of the jury trial waiver, and therefore denied defendant's motion.

As we have discussed, under *Chambers* the trial court properly considered defendant's reason for requesting withdrawal of his jury trial waiver and the circumstances surrounding his request. (*Chambers*, *supra*, 7 Cal.3d at p. 671.) There is no indication in the record that the trial court relied on the good cause standard for guilty plea withdrawals set forth in section 1018 in exercising its discretion to deny defendant's request. For these reasons, we find no merit in defendant's claim of ineffective assistance of counsel.

C. Sentencing Error

Defendant contends that imposition of a consecutive one year four month sentence on the conviction of possession of a firearm by a felon violates the section 654 prohibition on multiple punishment.

1. Section 654

Subdivision (a) of section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." The purpose of the statute is to ensure that the punishment is commensurate with the defendant's culpability. (*People v. Correa* (2012) 54 Cal.4th 331, 341.)

"The proscription against double punishment in section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he [or she] may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted (*Perez*).)

" 'Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.' [Citation.]" (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378.) We also defer to express or implicit determinations that are based upon substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

2. Analysis

Relying on the decision in *People v. Atencio* (2012) 208 Cal.App.4th 1239 (*Atencio*), defendant argues that his offenses of residential burglary (§ 459) and

possession of a firearm by a felon (former § 12021, subd. (a)(1)) had one course of conduct with one criminal objective, which was to possess the firearms. Alternatively, defendant contends that section 654 applies because the residential burglary was the incidental means to accomplish the single objective of possession of the firearms.

The People disagree. They argue that the record (including the probation report) shows that defendant "committed three separate acts with George Duffey's firearms: he stole them, he possessed them, and then he sold two of them. [Defendant] also harbored separate intents with respect to the firearms: he intended to steal, intended to possess, and intended to sell." Defendant replies that any sale of the firearms was incidental to their possession. He also contends that he was charged with the possession of only two firearms and, for purposes of section 654, only his intent and objective as to those two firearms may be considered.

At the sentencing hearing, the trial court stated that "[t]he Court does find that [section] 654 is not applicable to this situation. The defendant may be sentenced on both [convictions]." Although the trial court did not specify its findings, "[a] trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Here, the evidence showed that defendant obtained four firearms, two bullet-resistant vests, approximately six to eight duty badges, and a duffle bag during his burglary of Duffey's apartment. The day after the burglary, the parole search of defendant's mother's apartment recovered some of Duffey's property, including one revolver and one semi-automatic handgun, as well as a bullet-proof vest, holsters, and bullets. The probation report[4] stated that when defendant was taken into custody in

[4] The trial court may properly consider the probation report in sentencing. (*People v. Santana* (1982) 134 Cal.App.3d 773, 780-783 (*Santana*); Cal. Rules of Court,

Calexico, the property recovered from his vehicle included a black duffel bag with the victim's nametag. Defendant also had $200 in cash, and, when asked "where the guns were, [defendant] told police that he had sold them."

On these facts, we determine that substantial evidence supports the trial court's implied finding that defendant had two criminal objectives when he burglarized Duffey's apartment. Defendant intended (1) to possess some of the firearms taken from the apartment; and (2) to sell some of the firearms taken from the apartment. Since these criminal objectives were independent of and not merely incidental to each other, defendant may be separately punished for the offenses of residential burglary and possession of a firearm by a felon even if the offenses are considered part of "an otherwise indivisible course of conduct." (*Perez, supra,* 23 Cal.3d at p. 551.)

We also determine that the decision in *Atencio* is factually distinguishable and therefore does not "control[] this case," as defendant argues. In *Atencio,* the defendant was found guilty of grand theft of a firearm and firearm possession by a felon. (*Atencio, supra,* 208 Cal.App.4th at p. 1240.) The evidence showed that the defendant took a pistol from the victim's house and then abandoned it in another house. (*Id*. at p. 1243.) The appellate court ruled that section 654 prohibited multiple punishment for the two offenses, because the "defendant's theft of the pistol was merely the means by which he gained possession of the pistol. Under these facts, without more, there was no substantial evidence to support the trial court's double punishment of defendant for taking the pistol and subsequently possessing it." (*Id*. at p. 1244.)

The *Atencio* court also stated, "what we have here is a course of conduct pursuant to one criminal objective—to possess the gun—and based on that there is but one act that can be punished under section 654." (*Atencio, supra,* 208 Cal.App.4th at p. 1245.) In

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rule 4.411(d).) Further, "[t]he fact that the probation report contained hearsay is in itself not improper." (*Santana, supra,* at p. 780.)

contrast, there is substantial evidence to show that defendant's burglary of Duffey's apartment had two objectives: to possess stolen firearms and to sell stolen firearms. As another appellate court has observed, "[c]ommission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon. [Citations.]" (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1414.)

We therefore conclude that section 654 therefore does not bar multiple punishments for defendant's offenses of residential burglary and possession of a firearm by a felon.

V. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MÁRQUEZ, J.